IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3560 OF 2005.

Vishvas Dattatray Kulkarni.
Age 35 years, Occ.: Business,
R/o. 3/4/5/2/2 Ganesh Nagar,
Near Water Reservoir, Anand
Valli, Satu Link Road, Nashik. ... Applicant.

Versus.

1. Bhalchandra Balwant Takle
   Age: 35, Occ.: Retired.
2. Sagar Bhalchandra Takle,.
   Age: 35, Occ.: Business.
3. Sarang Bhalchandra Takle,
   Age 33, Occ.: Business,
   All R/o. 772, Takle Wada,
   Bhawani Peth, Nashik. ... Respondents.

Shri D.K.Ghaisas for the Applicant.

Shri H.E.Palwe for the Respondents Nos.1 to 3.

Shri S.V.More, A.P.P. for the State.

CORAM : ABHAY S.OKA, J.

DATED : 20th December, 2006.

ORAL JUDGMENT.:

1. Leave is granted. Appeal is admitted. Leave Application be entered in the register of Appeals and be numbered accordingly. The Advocate for the first to third Respondents waives service. The learned A.P.P. waives service for the State. Taken up forthwith for final hearing.

2. Heard the learned Advocate appearing for the Applicant, the Advocate appearing for the first to third Respondents and the learned A.P.P. for the State. The

Applicant is the Complainant in a complaint filed alleging commission of offence under sections 417, 418, 427, 341, 380, 448, 451, 506 read with section 34 of the Indian Penal Code. On the said complaint, the learned Magistrate issued process. On 1st October 2004, when the case was called out before the learned Magistrate, the Applicant was not present in the Court and therefore, an order invoking power under section 256 of the Code of Criminal Procedure, 1973 was passed by the learned Magistrate by directing that the the complaint stands dismissed for want of prosecution and the accused are acquitted. The Applicant on the very day applied before the learned Magistrate for restoration of the Complaint. The learned Magistrate by order passed on the same day restored the complaint. The 1st to 3rd Respondents challenged the said order by preferring a Revision Application before the Sessions Court. By order dated 11th April 2005, the Revision Application was allowed by holding that the learned Magistrate had no jurisdiction to restore the complaint and the remedy available to the Applicant was different. Therefore, the Applicant has preferred the present Application under section 378(4) of the said Code praying for grant of special leave to prefer an Appeal against the order of dismissal of the Complaint passed by the learned Magistrate.

3. The Advocate for the Applicant submitted that

all along the Applicant was prosecuting the complaint diligently and therefore, the learned Judge committed an error by dismissing the complaint. The learned Advocate for the 1st to 3rd Respondents supported the impugned order by pointing out that the learned trial Judge was fully justified in passing the order of dismissal.

4. I have considered the submissions. When the case was called out on 1st October 2004, it was fixed for cross-examination of the Applicant. It appears that in the morning session till 1.30 p.m. the Applicant was present in the Court. According to the case of the Applicant, he was called at 2.30 p.m. When the case was called out after 2.30 p.m. the Applicant was not present in the Court Hall and therefore the order of dismissal of the complaint was passed. I find that the Applicant has prosecuted the complaint diligently. On the day on which the complaint was dismissed, it appears that the Applicant was present in the Court premises, but when the case was called out, he was not present in Court hall. In my view the learned Magistrate ought not to have taken a harsh view of the matter in view of the earlier conduct of the Applicant. The order passed by the learned Magistrate on 1st October 2004 deserves to be quashed and set aside.

5. Hence the following order is passed:

i) The order dated 1st October 2004 passed in Criminal Case No.786 of 2001 by the learned 2nd Joint Civil Judge, Junior Division and Judicial Magistrate First Class, Nashik is quashed and set aside and the said Criminal Case is restored to file.

ii) The learned Magistrate will issue notice of the date fixed in the case to the Applicant as well as to the 1st to 3rd Respondents.

iii) Writ to be sent immediately.

Judge.